

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 KRISTIN K. MAYES
3 CHAIRMAN
4 GARY PIERCE
5 COMMISSIONER
6 SANDRA D. KENNEDY
7 COMMISSIONER
8 PAUL NEWMAN
9 COMMISSIONER
10 BOB STUMP
11 COMMISSIONER

12 IN THE MATTER OF THE APPLICATION OF
13 SOLARCITY FOR A DETERMINATION
14 THAT WHEN IT PROVIDES SOLAR
15 SERVICE TO ARIZONA SCHOOLS,
16 GOVERNMENTS, AND NON-PROFIT
17 ENTITIES IT IS NOT ACTING AS A PUBLIC
18 SERVICE CORPORATION PURSUANT TO
19 ART. 15, SECTION 2 OF THE ARIZONA
20 CONSTITUTION.

Docket No. E-20690A-09-0346

21 **RUCO'S COMMENTS IN RESPONSE TO**
22 **COMMISSIONER PIERCE'S LETTER OF JUNE 15, 2010**

23 The Residential Utility Consumer Office ("RUCO") submits these comments in response
24 to Commissioner Pierce's letter of June 15, 2010. RUCO would like to thank Commissioner
25 Pierce for the opportunity to respond to his proposed amendment #1.

26 RUCO supports the amendment and believes that it encapsulates RUCO's position in
27 this case—that SolarCity is not subject to Commission jurisdiction because an SSA is merely a
28 financing option. Through an SSA, SolarCity is not furnishing electricity and does not meet the
29 literal and textual definition of a "public service corporation." Furthermore, even if SolarCity
30 were furnishing electricity, SolarCity's business is not "clothed in the public interest" and the
31 *Serv-Yu* factors help guide the Commission to find that it is not in the public interest to regulate
32 these transactions.

1 RUCO believes that the language and rationale of the ROO as amended by Pierce
2 Amendment #1, would withstand judicial scrutiny. Furthermore, the proposed Order, as
3 amended by Pierce Amendment #1, signals regulatory stability to the emerging solar industry.

4 **Scope of Commission Jurisdiction**

5 RUCO respectfully submits an additional paragraph which, if adopted, would only
6 strengthen the amendment's reasoning. This new language asserts (1) a presumption against
7 regulation and (2) that the Arizona Courts have discouraged an overly-broad application of the
8 textual definition of Public Service Corporation. Both SRP and TEP have argued for a broad
9 interpretation of PSC which the courts in Arizona have disfavored. SRP Brief at 4-13 and TEP
10 Brief at 5, RUCO Reply Brief at 4-6.

11 To address these two important points, RUCO would suggest the following language be
12 added on page 6 as a substitute for the last sentence of the second paragraph which reads,
13 "However, even if SolarCity is "furnishing" electricity under a literal reading of the Constitution,
14 we do not believe that SolarCity is subject to Commission jurisdiction as a public service
15 corporation when the *Serv-Yu* factors are applied."

16 "Our determination is further supported by the case law in Arizona
17 which is clear that a PSC finding is dependant on the facts of each case
18 and is more than just an overly-broad and elastic application of a textual
19 definition. The Arizona courts have required: (1) a presumption against
20 regulation¹; (2) a prohibition against an unfettered power to issue
21 CC&Ns²; (3) a declaration that "furnishing" requires a transfer of
22 possession³; and (4) that even when a corporation meets the textual
23 definition of a PSC, jurisdiction shall be denied if the public interest
24 requires it⁴. In this case, even if Solar City is "furnishing" electricity
under a literal reading of the Constitution, we do not believe SolarCity is
subject to Commission jurisdiction as a public service corporation when
the *Serv-Yu* factors are applied."

¹ *Arizona Corp. Commission v. Continental Sec. Guards* (App. 1967), 5 Ariz. App. 318, 426, P. 2d 418 vacated
103 Ariz. 410, 443 P.2d 406; *General Alarm v. Underdown*, 76 Ariz. 235, 262 P.2d 671 (1953).

² *Williams v. Pipe Trades Industry Program of Arizona*, 100 Ariz. 14, 20, 409 P.2d 720, 726 (1966).

³ *Williams* at 20, 409 p.2d 720, 724

⁴ *Natural Gas Serv. Co. v. Serv-Yu Coop.*, 70 Ariz. 235, 219 P.2d 324 (1950).

1 A new conclusion of law also reflects this position.

2 Page 14. Add a new Conclusion of Law before the proposed new
3 Conclusion of Law 3.

4 “We conclude that SolarCity has not met the literal and textual
5 definition of a public service corporation under Article 15,
6 Section 2 of the Arizona Constitution and find that SolarCity is
7 not furnishing electricity. However, even if SolarCity is
8 furnishing electricity under a literal reading of the Constitution,
9 we do not believe SolarCity’s acts are sufficiently clothed in
10 the public interest to warrant Commission jurisdiction under a
11 review of the *Serv-Yu* factors”.

12 **Finding of Fact 34**

13 Pierce Amendment #1 eliminates an analytical conundrum in the ROO as highlighted in
14 FOF 34. FOF 34 states that solar leases do not trigger Commission jurisdiction “as that
15 situation does not include the “furnishing [of] electricity” under the Arizona Constitution...”. The
16 ROO’s conclusion in FOF 34 is not supported by any discussion within the proposed Order.
17 However, the ROO finds SSAs do result in jurisdiction. Through an SSA, SolarCity is
18 furnishing electricity (Conclusions of Law 3 and 4) because it owns the installation (ROO at p.
19 22, lines 15-25).

20 At hearing, RUCO noted that a legal analysis finding jurisdiction over SSAs due to
21 ownership must ultimately lead to jurisdiction over leases for the same reason. Pierce
22 Amendment #1 resolves⁵ this analytical conflict within the ROO that an SSA furnishes
23 electricity because the installer owns the installation, but a lease does not furnish electricity
24 even though the installer owns the installation.

⁵ Since under Pierce Amendment #1 there is no finding of jurisdiction based on the finding that there is no furnishing of electricity similar to the lease situation.

1 Other Matters

2 With regard to whether anything in the amendment should be added or removed, RUCO
3 would offer the following small suggestions.

4 Page 2 of the amendment, second to last paragraph after “succinctly
5 articulated” add “in 2006”

6
7 Page 6, second to last paragraph at the end of the paragraph add “as the
8 Court of Appeals held in *Southwest Transmission Cooperative, Inc. vs.*
9 *ACC*, 213 Ariz. at 427, 142 P.3d. at 1240 (App. 2006).

10 Page 7. The third paragraph compares this docket to the furnishing of water
11 to a trailer park in the *Nicholson* case. However, on page 6, the second
12 paragraph of the Pierce Amendment finds that SolarCity is not furnishing
13 electricity. A clarifying phrase at the beginning of the 3rd paragraph on page
14 7 could be inserted. “Even arguing that SolarCity is furnishing electricity
15 under an SSA,....(and strike “Instead,”).

16 Page 12, second full paragraph add “and no regulation”.

17 Page 12, third full paragraph, insert after “(1) operating in a highly
18 competitive environment,” the following “and is not in a disparate position of
19 bargaining power”.

20 Conclusion

21 Finally, RUCO believes that the amendment will create good precedent for future
22 adjudication requests. RUCO finds the ROO with Pierce Amendment #1 is well written, well
23 reasoned and supported by substantial evidence. It is also clear in point and does not appear
24 to create ambiguities. This proposed Order will not bind future Commissions. As noted, this

1 Order is based upon the specific facts presented in this docket. A future Commission retains
2 its full jurisdictional prerogative to assert jurisdiction if it finds that a change in facts warrants
3 such action.

4 RUCO hopes that its comments are helpful. RUCO, as always, will come prepared to
5 the Open Meeting to address this amendment and all of the other issues that are raised.
6 RUCO would again like to thank the Commission for its consideration in this matter.

7 RESPECTFULLY SUBMITTED this 28th day of June, 2010.

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10 _____
Daniel W. Pozefsky
Chief Counsel
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